Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Teamsters Local Union 938,

complainant,

and

Vitran Express Canada Inc.,

respondent.

Board Files: 28707-C and 28732-C

Teamsters Local Union 938,

applicant,

and

Vitran Express Canada Inc.

employer.

Board File: 28708-C

Neutral Citation: 2011 CIRB **598**
June 24, 2011

Canada

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Daniel Charbonneau and David P. Olsen, Members.

Counsel of Record

Ms. Tracey Henry, for Teamsters Local Union 938;
Mr. Thomas A. Stefanik, for Vitran Express Canada Inc.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

I–Nature of the Application

[1] Section 16.1 of the *Canada Labour Code* (*Part I Industrial Relations*) (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to issue this interim decision without an oral hearing.

[2] The Board is seized with three files: a certification application and two separate unfair labour practice (ULP) complaints related to the certification drive.

[3] The parties have proposed settling all three files on the condition that the Board order a representation vote. The Board has decided to exercise its discretion to order a vote for the following reasons.

II–Facts

[4] On April 15, 2011, the Teamsters Local Union 938 (Teamsters) filed a certification application (File no. 28708-C) for a unit of employees working at Vitran Express Canada Inc. (Vitran). The parties agreed for the most part on the appropriate bargaining unit, except that Vitran argued the unit

should also include sales representatives.

[5] Vitran is in the business of international and interprovincial transportation and distribution. The Teamsters had earlier withdrawn a certification application it had initially filed with the Ontario Labour Relations Board.

[6] Also on April 15, 2011, the Teamsters filed a ULP complaint (File no. 28707-C). In that complaint, the Teamsters alleged that an employee had been terminated due to her participation in the organizing drive. The termination allegedly had a chilling effect on the certification campaign.

[7] Vitran disputed that allegation and alleged that the employee had been on probation and was terminated solely for performance issues.

[8] On April 26, 2011, the Teamsters added further particulars to its complaint concerning a memorandum that Vitran had sent to all employees regarding the certification application. Vitran argued that there was nothing in its memorandum that violated the *Code*.

[9] On May 2, 2011, the Teamsters filed an application for interim relief pursuant to section 19.1 of the *Code* (File no. 28732-C). In that application, they asked the Board, *inter alia*, to reinstate the terminated employee, pending a hearing on the merits of their ULP complaint.

[10] The Teamsters requested various permanent remedies in their main ULP complaint (File no. 28707-C) if the Board found that Vitran had violated sections 94(1), 94(3) and/or 96 of the *Code*. The Teamsters also raised the Board's power to certify a trade union as a remedy for an unfair labour practice, pursuant to section 99.1 of the *Code*.

[11] The *Code* encourages parties to discuss possible resolutions of their differences. The Board's staff of Regional Directors and Industrial Relations Officers (IROs) are available to assist in these efforts. The parties may also request the assigned panel to intervene and attempt to resolve any issue, without impacting the panel's ability to decide the case on the merits:

> 15.1 (1) The Board, or any member or employee of the Board designated by the Board, may, if the parties agree, assist the parties in resolving any issues in dispute at any stage of a proceeding and by any means that the Board considers appropriate, without prejudice to the Board's power to determine issues that have not been settled.

[12] Vitran and the Teamsters availed themselves of the services of one of the Board's IROs and, following privileged discussions, arrived at a proposed settlement. The panel is not aware of the terms of the settlement, but has been asked by the parties to order a representation vote as a condition precedent to the settlement becoming final.

[13] On June 14, 2011, the Board received a letter from Vitran's legal counsel summarizing the parties' joint request:

> On or about June 9, 2011, the parties entered into comprehensive Minutes of Settlement to resolve all matters with regard to CIRB File. No. **28708-C**, CIRB File. No. **28707-C** and CIRB File. No. **[28732-C]** (the "Minutes of Settlement").
>
> As part of the comprehensive settlement, the parties agreed to jointly request that the Canada Industrial Relations Board (the "Board") order a representation vote of all employees within an agreed upon bargaining unit as a final resolution of CIRB File. No. 28708-C, CIRB File. No. 28707-C and CIRB File. No. [28732-C]. The Minutes of Settlement are conditional upon the Board ordering the representation vote of all employees within the agreed upon bargaining unit who are listed at Schedule 'A' to this correspondence.
>
> [sic]
>
> (emphasis in original)

[14] The bargaining unit to which the parties agreed included the sales representatives as Vitran had proposed in its response. The parties indicated what would occur should the Board decide not to order a representation vote:

> Should the Board decline to order a representation vote of all 133 employees in the voting constituency described above and named in Schedule "A", the Minutes of Settlement will be null and void and the applications that are the subject of CIRB File. No. **28708-C**, CIRB File. No. **28707-C** and CIRB File. No. **[28732-C]** will proceed. The parties reserve their right to make further submissions to the Board on any outstanding issues in those files in the event that the matters proceed.
>
> [sic]
>
> (emphasis in original)

III–Analysis and Decision

[15] The Board will order a vote as the parties jointly requested.

[16] The *Code* grants the trade union the initial right to propose the bargaining unit it seeks to represent:

> 24. (1) A trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining may, subject to this section and any regulations made by the Board under paragraph 15(c), apply to the Board for certification as the bargaining agent for the unit.
>
> (emphasis added)

[17] However, the Board has the obligation under the *Code* to satisfy itself of the appropriateness of any bargaining unit it certifies:

> 27. (1) Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining.
>
> ...
>
> 28. Where the Board
>
> (*a*) has received from a trade union an application for certification as the bargaining agent for a unit,
>
> (*b*) has determined the unit that constitutes a unit appropriate for collective bargaining, and
>
> (*c*) is satisfied that, as of the date of the filing of the application or of such other date as the Board

> considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,
>
> the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.
>
> (emphasis added)

[18] Unlike in many provincial jurisdictions, the Board remains seized of all bargaining unit descriptions. The parties are not free to modify those descriptions during collective bargaining.

[19] Rather, the parties may apply to the Board to clarify the scope of their existing bargaining units. Similarly, the scope of an existing unit may be amended, provided the applicant trade union demonstrates double majority support in the existing unit and for the employees it seeks to add: see, for example, *Société en commandite transport de valeurs Garda*, 2010 CCRI 503, at paragraphs 28-31.

[20] The Board's continuing jurisdiction over the description of its bargaining units allows it to carry out bargaining unit reviews, pursuant to section 18.1 of the *Code*:

> 18.1 (1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.

[21] Nonetheless, the Board's continuing jurisdiction over the description of bargaining units does not mean that it will not encourage agreements from the parties, where appropriate. In 1999, when the bargaining unit review power was codified in section 18.1, the Legislator obliged the Board to give the parties time, during a review, to agree on the appropriate bargaining unit:

18.1 (2) If the Board reviews, pursuant to subsection (1) or section 35 or 45, the structure of the bargaining units, the Board

(*a*) must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from the review; and

(*b*) may make any orders it considers appropriate to implement any agreement.

(emphasis added)

[22] The Board has considered the parties' suggested bargaining unit as described in their joint June 14, 2011 letter and has no difficulty agreeing that it is an appropriate bargaining unit.

[23] The Board also agrees with the parties' joint request to order a representation vote. The parties' settlement encompasses not only a certification application, but also two existing ULP complaints.

[24] For stand-alone certification applications, sections 29(1) and (2) set out the Board's authority to order representation votes:

29. (1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit.

(2) Where a trade union applies for certification as the bargaining agent for a unit in respect of which no other trade union is the bargaining agent, and the Board is satisfied that not less than thirty-five per cent and not more than fifty per cent of the employees in the unit are members of the trade union, the Board shall order that a representation vote be taken among the employees in the unit.

(emphasis added)

[25] The Board's predecessor, the Canada Labour Relations Board (CLRB), decided that it could order a representation vote in situations involving certification applications and concurrent ULP complaints: see, for example, *Canadian Imperial Bank of Commerce (Victory Square Branch)* (1977), 25 di 355; [1978] 1 Can LRBR 132; and 78 CLLC 16, 120 (CLRB no. 104); and *Echo Bay Mines Ltd.*

(1996), 102 di 91 (CLRB no. 1179). Such votes were not dependent on the level of membership support.

[26] The Board is not commenting on the Teamsters' membership support in the instant case. Similarly, it has made no finding regarding the validity of the allegations contained in the Teamsters' ULP complaints and Vitran's response to those allegations.

[27] However, the Board has satisfied itself, as set out above, that the *Code* allows it to give effect to the parties' joint request to resolve their current differences by way of a representation vote. Accordingly, the Board will exercise its discretion to order that a representation vote take place. The Board's order in this regard is attached hereto.

[28] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

Daniel Charbonneau
Member

David P. Olsen
Member

File Nos. 28707-C, 28708-C and 28732-C

IN THE MATTER OF THE

Canada Labour Code

- and -

Teamsters Local Union 938,

applicant,

- and -

Vitran Express Canada Inc.,
Concord, Ontario,

employer.

WHEREAS the Canada Industrial Relations Board (Board) has received an application from the applicant union for certification as bargaining agent for a unit of employees of Vitran Express Canada Inc., pursuant to section 24 of the *Canada Labour Code (Part I–Industrial Relations)* (*Code*);

AND WHEREAS, the Board has received two complaints of unfair labour practice from the applicant, pursuant to section 97(1) of the *Code*;

AND WHEREAS, by letter dated June 14, 2011, the parties advised the Board that they have reached a tentative settlement in respect of all the above-mentioned matters, but on the condition that the Board orders the holding of a representation vote for their proposed bargaining unit;

AND WHEREAS, for the reasons expressed in *Vitran Express Canada Inc.*, 2011 CIRB 598, the Board accepts the proposed bargaining unit and is satisfied it may order a vote as requested;

NOW, THEREFORE, the Board orders a representation vote be held for the following bargaining unit:

> *"all employees of Vitran Express Canada Inc. in the City of Vaughan, Ontario, excluding managers, those above the rank of manager, security guards, students, and those who are covered by a subsisting collective agreement."*

AND FURTHERMORE, employees eligible to cast a ballot are those 133 employees listed at Schedule 'A' of the parties' agreement (attached).

AND FURTHERMORE, Ms. Lisa Rotatore, Industrial Relations Officer, Canada Industrial Relations Board, has been appointed Returning Officer to supervise the vote. She will communicate with the parties in the near future.

AND FURTHERMORE, the Board retains jurisdiction to determine any remaining issues following the vote.

ISSUED at Ottawa, this 24th day of June, 2011, by the Canada Industrial Relations Board.

Graham J. Clarke
Vice-Chairperson